Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DOUGLAS C. KENDRICKS -
PETITIONER

vs.

PEOPLE OF THE STATE OF MICHIGAN -
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

DOUGLAS C. KENDRICKS
Petitioner, Pro Se
P.O. Box 170922
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QUESTION(S) PRESENTED

SHOULD THE MICHIGAN SUPREME COURT HAVE GRANTED MY APPLICATION FOR LEAVE TO APPEAL WHEN MY RIGHT TO DUE PROCESS WAS DETERED DUE TO CITED AND ADMONISHED COURT APPOINTED APPELLANT COUNSEL MISCONDUCT AND INEFFECTIVENESS?

LIST OF PARTIES

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Douglas C. Kendricks, pro se, respectfully prays that a writ of certiorari issue to review the unpublished opinion and judgement of THE STATE OF MICHIGAN COURT OF APPEALS; Case No: 251882, entered on March 24, 2005 (Appendix C).

OPINIONS BELOW

The March 24, 2005 judgement and unpublished opinion of the State of Michigan Court of Appeals appears as Appendix C. The decision of the State of Michigan Supreme Court December 27, 2005 appears as Appendix A. The reconsideration decision of the State of Michigan Supreme Court February 27, 2005 appears as Appendix B.

JURISDICTION

The Michigan Supreme Court decided my case on December 27, 2005. A copy of that decision appears at Appendix A.

A timely petition to the Michigan Supreme Court for reconsideration was thereafter denied on the following date: February 27, 2006, and a copy of that order appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C.§1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or press; or the right of the people to peaceably to assemble, and to petition the Government for the redress of grievances.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall and State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Cuyler v. Sullivan, 446 U.S. 335 (1980); The Sixth Amendment right to the effective assistance of counsel applies equally to retained and appointed counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985); "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel."

This case stems from a charge of third degree child abuse (MCL 750B5) allegedly having been committed by myself, Petitioner, Douglas C. Kendricks, and involving my eleven-year old daughter, Christine Kendricks. A preliminary examination was held on June 12, 2001, at the District court. The Prosecutor called my two minor daughters, Christine Kendricks, alleged victim, age 11 and Jasmine Kendricks, age 12, to testify at said hearing. Both denied that there was any physical abuse by their father. Christine emphatically testified that her father did not cause any injury to her body and told that to the people who were interrogating her. She also testified that she was not coached concerning her testimony.

Jasmine testified that she did not witness her father physically discipline her sister and likewise told that to the people who were interrogating her. She further stated that their father has never physically disciplined her or her sister and brother.

Both Jasmine (age 12) and Christine (age 11) are very intelligent girls whose psychological evaluations conducted by the Oakland County Family Court Psychological Clinic, indicated above average in all areas noting most at the 12th grade level. Both girls presented well at the preliminary hearing. Neither girl was intimidated nor confused about the court proceeding or of the questions asked of them. They each responded to the questions asked of them, with answers that were intended and without hesitation.

As a result of the alleged victim testimony not supporting the allegations in the charge, the prosecutor presented witnessed who interrogated Christine and Jasmine. Those witnesses were, Principal Antoinette Burk, Linda Taylor, Family Independence Agency (FIA) worker Jacinda Kent (Jones) and the officer in charge, Detective Teresa Harrison, now Officer Harrison. It should be noted that all of these witnesses did not interview Jasmine Kendricks. The statements of Antoinette Burk and Linda Taylor did not supply any evidence that a crime was committed.

The testimony of Jacinda Kent and Detective Harrison involved statements that were allegedly made by Jasmine only that implicated me in this matter. Defense Counsel, Elbert Hatchett, vehemently objected to the admission of their testimonies on the ground that it was hearsay and it did not fall within an enumerated exception to the hearsay rule. Nevertheless, the district court ruled that the testimony, although clearly, hearsay, could not be entered for the truth of the matter asserted, but was admissible pursuant to the hearsay "catch-all" exception (MRE 803.24). This matter was bound over for trial. The misdemeanor (01-002028-SM) was bound over to the circuit court (01-178867-FH) under 750.136b(5), third degree child abuse based on hearsay and without competent medical evidence.

A jury trial was held on August 4 and 5, 2003. On August 4, 2003, Oakland County Prosecutor, Robert Novy, advised Judge Gene Schnelz that the Prosecutor's office did not know the whereabouts of endorsed witnesses Christine (age 13) and Jasmine Kendricks (age 14) because they were hidden by me. Trial court allowed the proffered hearsay testimony to establish a material fact under MRE 803.24. After hearsay testimony was entered, prosecution witness, Officer Harrison testified that as of the previous Monday (July 28, 2003), the Troy Police Department and the Oakland County Sheriff Department knew the children (Christine and Jasmine) whereabouts. However, both

departments chose not to obtain or make arrangements to bring these available witnesses to court.

After Officer Harrison's testimony, the prosecution presented Deputy Clay Jansson, who testified that he interrogated me while I was in custody at the Oakland County Jail and represented by counsel during the week of July 21, 2003. He testified to having two conversations with me concerning the children's location while acting on a court order to bring Christine and Jasmine Kendricks before the court, for which I would be assess the cost for their retrieval. Deputy Clay Jansson testified that if he knew Christine and Jasmine whereabouts he would leave that day and go get them to bring them before the court. Note, Deputy Jansson retrieved the girls from Milwaukee, WI and presented them to the court on August 26, 2003, which was after both my conviction on August 5, 2003 and sentencing on August 21, 2003.

At the trial, defense sought to introduce Defense Exhibit 2, a fax document received by the court indicating that Lieutenant Childs of the Milwaukee Police Department would be available to testify later that day concerning the Milwaukee Police Department taking both Christine and Jasmine Kendricks into custody on July 17, 2003 at the behest of Oakland County law enforcement. The Court, not willing to wait, denied the admission of this evidence but allowed defense counsel to preserve its entry on appeal.

On August 6, 2003, the Oakland County Prosecutor informed the court that the children whereabouts had been known and they had the girls taken into custody (July 17, 2003) prior to my criminal trial. The contempt hold on me concerning the children whereabouts should have been satisfied at that time (MCL600.1715). Is it malicious prosecution and/or prosecutorial misconduct and/or obstruction of justice to continue the contempt hold after the children were taken into custody and the contempt purged? If I am in custody, and the prosecutor has taken the girls into

custody, it is their due diligence to produce these endorsed witnesses for trial.

It is reasonable to infer that the Oakland County Prosecutor statement to the Judge on August 4, 2003 indicating that the children whereabouts were unknown was prosecutorial misconduct and/ or obstruction of justice. Was it a failure of the prosecutor to exercise due diligence to have the children taken into custody on July 17, 2003 and not produce them before the court until August 26, 2003 after the trial and sentencing? It is not unreasonable for the prosecutor to have produced these endorsed witnesses for trial when they demonstrated post-conviction that they had the ability to do so. If a prosecutor endorses a witness, he is obliged to exercise due diligence to produce that witness at trial. *People v. Eccles*, 260 Mich App 379, 388; 677NW2d 76 (2004). A reasonable person could infer that the Oakland County Prosecutor Office and Sheriff Department did not exercise due diligence in producing these witnesses for trial and should not be excused from their obligation and exercise of due diligence to have produced them for trial.

It is reasonable to infer that the prosecutor did not produce these witnesses for trial in order to validate the hearsay exception MRE 803.24 and also deprive me of my right to confrontation. My Six Amendment right to confront should not be negated. Both defense trial counsel and court appointed appellant counsel was ineffective for failure to protect my Six Amendment right to confrontation. *Crawford v Washington*, 124 SCT 1354 (2004), applies retrospectively because this case was pending on appeal when Crawford was decided.

Without the proffered hearsay statements, the prosecution would not have been able to establish the elements of the offense charged. The testimony of the alleged victim and declarant would have prevented the hearsay testimony from being proffered as the most probative evidence and would have been outcome determinative.

At the sentencing on August 21, 2003, I was given credit for time served and probation; however, I was not release from custody until August 26, 2003 whereupon the children were returned to my custody.

On September 5, 2003, a claim of appeal and request for appointment of counsel was filed. On December 19, 2003, court appointed appellant counsel, Jon F. Hummel was appointed. Court appointed counsel failed to file a timely motion for post-conviction hearing in order to amend and established a factual record during the period of concurrent jurisdiction. Note, defense attorney preserved the entry of new evidence on appeal during the trial. The new evidence would have been outcome determinative because it supported the following: (1) the prosecution knew the whereabouts and took custody of endorsed witnesses (Christine and Jasmine Kendricks) on July 17, 2003; (2) the prosecution did not exercise due diligence to bring endorsed witness (victim) to trial. The unavailability of this witness should be charged to the prosecution; (3) the hearsay testimony was not the most probative evidence; (4) the hearsay evidence lacked trustworthiness; (5) the hearsay evidence could not have been proffered to established a material fact.

Due to court appointed appellant counsel misconduct and ineffectiveness, as cited by the State of Michigan Attorney Grievance Commission (Appendix D), I was denied the opportunity to submit post-conviction motions, to develop and amend the facts of the case at bar, and to present oral argument to the State Court of Appeals.

The denial of post-conviction motions, which would have been outcome determinative, due to ineffective assistance of court appointed appellant counsel is detrimental to my right to due process and the administration of justice.

REASONS FOR GRANTING THE PETITION

Fundamental justice compels this Honorable Supreme Court of the United States to provide desperately needed guidance through the grant of a writ of certiorari.

The State Court decision should be reviewed because it raises constitutional issues concerning the right to effective assistance of counsel. The State of Michigan Attorney Grievance Commission whose members are appointed by the State of Michigan Supreme Court cited court appointed appellant counsel for professional misconduct and ineffectiveness (Appendix D).

The state of Michigan Court of Appeals (the last court to review the merits of the case) did not address the question of the right to effective assistance of court appointed appellant counsel in their opinion. This issue was raised on appeal to the Michigan Supreme Court. This legal principle is very important to State and Federal Constitutional Protections. The Court of Appeals decision was limited to the trial court record, which did not contain trial court off the record ineffective performance. The Attorney Grievance Commission admonishment of court appointed appellant counsel was not addressed in the Court's opinion; even though, I asked the question in my supplemental pro per brief.

The right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The benchmark for judging whether counsel acted ineffectively is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and *People v Garcia,* 398 Mich. 250, 265; 247 N.W.2d 547 (1976). *Strickland* requires a defendant to demonstrate counsel's performance was deficient by showing specific acts or omissions of his attorney that fall outside the wide range of professionally competent assistance. *Strickland*, at 687. The defendant must also show counsel's errors were prejudicial, or in other words, so serious as to deprive him of a fair trial - a trial for which the result is

reliable. *Id.* Court appointed appellant counsel error and deficient performance were prejudicial, outcome determinative and denied me due process to appeal my conviction and prevented me from developing a factual record. Regardless of the ineffective assistance of defense trial counsel claim, the development of a factual record would have been outcome determinative resulting in a favorable determination. The underlying theme leading to my conviction as reviewed by the Court of Appeals decision was that I was responsible for my daughters absence at the trial and that the prosecution exercised due diligence in producing endorsed witnesses (Jasmine and Christine Kendricks) for trial.

On January 27, 2005, The Attorney Grievance Commission ruled that Appellant Counsel assistance fell outside the range of professional competence and admonished him (Appendix D)- Attorney Grievance Commission File No. 2247/04). Appellant counsel, failed to file timely post-conviction motions which, under the circumstances of the case, should have been requested. He further failed to timely process the appeal resulting in the involuntary dismissal of the appeal and the lost of oral arguments on appeal. His conduct violated MCR 9.104(A)(1)-(4); and the Michigan Rules of Professional Conduct, to wit: 1.1(a)-(c); and 1.3.

Due to ineffective assistance of court appointed appellant counsel, there was no post conviction hearing. This limited my claim of ineffective assistance of trial counsel and request for new trial to mistakes apparent on the record. A record that did not reflect the whole truth and one that I was denied the right to amend, even though this right was preserved during the trial court. The record is clear that the right to enter this new evidence was preserved. And, the inability to enter this new evidence at the appellant level is a denial of a fundamental right to due process and a fair appeal. My appeal would have been different but for court appointed appellant counsel's

performance which the State Court of Appeals did not address in their opinion. Nor was the Michigan Supreme Court convinced to hear the question concerning ineffective assistance of court appointed appellant counsel on one's first claim of appeal, a violation of my Six Amendment's guarantee that, "in all criminal prosecutions, the accused shall enjoy the right—to have the Assistance of Counsel for his defense.

On February 3, 2005, I made the Court of Appeals aware that I was without representation on my first claim of appeal. In light of the decision by the State of Michigan Attorney Grievance Commission, the Court of Appeals should have addressed the matter of ineffective assistance of court appointed appellant counsel in order to protect my right to due process. United States v. Cronic, 466 U.S. 648 (1984) ...if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

The guidance of this Honorable Supreme Court of the United States is needed because the State Court of Appeals has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

In People v. Pendygraft, unpublished (1999), the Michigan Court of Appeals has ruled that because no motion for a new trial or an evidentiary hearing was made, the Court's review of defendant's claim is limited to the present record. In the case at bar, trial counsel preserved the right to present new evidence on appeal. Therefore, it was unfair for the State Court of Appeals to have reviewed portions of the case without affording me the opportunity to amend the record in light of the ineffective assistance of appellant counsel. The State Court of Appeals should have remanded the case back to the lower court for completion of the record and not conducted a *de novo* Ginther review.

CONCLUSION

The petition for a writ of certiorari should be granted for all the foregoing reasons because the rights of the accused to due process should be protected at all levels of the criminal proceedings and should not be lost as a result of misconduct by a member of the bar.

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor Chief Justice
Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, Justices

Order

December 27, 2005

128704

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

SC: 128704
COA: 251882
Oakland CC: 2001-178867-FH

DOUGLAS CHARLES KENDRICKS,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the March 24, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Seal of the Michigan Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court. December 27, 2005 "s/Corbin R. Davis".

APPENDIX B

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor Chief Justice
Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, Justices

Order

February 27, 2006

128704
(65)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

SC: 128704
COA: 251882
Oakland CC: 2001-178867-FH

DOUGLAS CHARLES KENDRICKS,
Defendant-Appellant.

_____/

On order of the Court, the motion for reconsideration of this Court's order of December 27, 2005 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Seal of the Michigan Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court. February 27, 2006 "s/ Corbin R. Davis".

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
UNPUBLISHED
Plaintiff-Appellee, March 24, 2005

V No. 251882
Oakland Circuit Court
LC No. 2001-178867-FH

DOUGLAS CHARLES KENDRICKS,

Defendant-Appellant.

Before: Zahara, P. J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for third-degree child abuse, MCL 750.136b(5). We affirm defendant's conviction, but vacate the order of restitution.

Defendant first argues that the trial court erred by not hearing his motion to quash the information before trial. Defendant waived this issue because he withdrew the motion before the date set for hearing; accordingly, the trial court did not err. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next contends that the prosecution did not exercise due diligence to produce endorsed witnesses, specifically to of defendant's children, Jasmine and Christine, for trial. We disagree. Whether the prosecutor has exercised

due diligence in attempting to obtain a witness is a matter of reasonableness and depends on the facts of each case. *People v Beam*, 457 Mich 677, 684; 580 NW2d 390 (1998). The trial court's decision on the issue is reviewed for an abuse of discretion. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995).

If a prosecutor endorses a witness, he is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). But the prosecution may be excuse from the duty by showing that the witness could not be produced despite the exercise of due diligence. *Id.* Due diligence is the attempt to do everything reasonable, not everything possible, to secure the presence of a witness at trial. *People v Cumming*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Here, the prosecution presented evidence that substantial efforts ere made to locate Christine and Jasmine, Oakland County Deputy Clay Jansson testified that the Oakland County Sheriff's Department was willing to do anything necessary to get the girls back to Michigan for the court appearances, including traveling to another state to get them, but defendant and his wife would not cooperate. Therefore, the prosecution exercised due diligence in attempting to locate the witnesses.

Defendant next raises and ineffective assistance of counsel claim premised on several grounds, none of which warrant a new trial. Because there was no *Ginther*[1] hearing, our review is limited to mistakes apparent of the record. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NWd2 246 (2002). We review the trial court's factual findings for clear error and its constitutional determination de novo. *Id.*

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance fell below an objective standard of reasonableness and a reasonable probability that the outcome of the trial would have been different but for trial counsel's error *People v Ackerman*, 257 Mich App 434, 455; 669 N2d 818 (2003). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

First, defendant argues that his trial counsel was ineffective because he did not object to the admission of inadmissible hearsay testimony that identified him as the source of his daughter's bruises. Whether the evidence constituted inadmissible hearsay must first be determined, with the trial court's decision reviewed for an abuse of discretion. People v McDaniel, 469 Mich 409, 412; 670 NW2d 659 (2003).

Hearsay is inadmissible unless it is subject to an established exception. MRE 802. Here, defendant alleges that his daughter Jasmine's statements to FIA employees, Jacinda Jones and Tracy Van Houghten, were improperly admitted at the trial trough these witnesses. The hearsay statements were admitted under the "catch-all" exception, MRE 803(24). Evidence admitted under MRE 803(24) must satisfy four elements: "(1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on the fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interest of justice." *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003).

Here, considering the totality of the circumstances surrounding the statements, we conclude that they were sufficiently trustworthy. See *Id.* At 291 n 11. Factors that led to this conclusion of reliability include that Jasmine made the statement while away from her parents and before they

knew about the child abuse investigation, she made a statement—which was bases on her personal knowledge—about two days after the occurrence and she made another consistent statement about two weeks later, the statements were clear, detailed, and factual, and Jasmine had no motive to fabricate what happened to her younger sister. Although we note that Jasmine's statements appeared to be in response to questioning by the FIA employees regarding Christine's bruises, there is no evidence that the questioning as suggestive in any ay or that Jasmine felt pressured or coached into disclosing what happened. Further, the statements tended to establish what happened to Christine, a material fact. The statements were the most probative evidence of this material fact that the prosecution could offer in light of defendant's refusal to produce Jasmine, his minor child and the declarant, for in-court testimony as discussed above. And the general purpose of the hearsay rules, as well as the interests of justice are best served by the admission of these statements. In sum, the trial court did not abuse its discretion in admitting these statements. Therefore, defendant's counsel was not ineffective for failing to object to their admission.

Next, defendant argues that his trial counsel was ineffective for failing to object to the admission of a police dispatch report, which was inadmissible hearsay. We disagree. The routine data included in the report, including the place and time of the call, was admissible under MRE 803(6) as a record of regularly conducted activity or under MRE 803(8) as a public record. See, e.g., *People v Stacy*, 193 Mich App 19; 484 NW2d 675 (1992). However, the caller's description of the incident contained in the police dispatch report is hearsay within hearsay and must separately conform to a hearsay exception. MRE 805. It does not qualify as a present sense impression because there is no indication that the call as made "while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). The caller's description of the event was inadmissible hearsay. Nonetheless, defendant failed to

establish that admission of this hearsay was outcome-determinative because it does not name defendant and does not name a victim. Therefore, trial counsel was not ineffective for failing to object to its admission.

Defendant's next claim of ineffective assistance is that his counsel elicited inadmissible hearsay statements on cross-examination of a witness. We disagree. Trial counsel's strategy in eliciting the hearsay was soundly aimed at attacking the declarant's credibility. See *Ackerman, supra* at 455.

Finally, defendant argues that his counsel was ineffective for failing to discover a medical examination performed on Christine two weeks after the alleged abuse. He also argues that the prosecutor committed misconduct by not turning over this evidence before trial. We disagree. These arguments have no merit. It is clear from the record that defendant possessed the results of the medical examination as early as September 2002, almost a year before trial. In sum, defendant has failed to overcome the presumption that he received the effective assistance of counsel. See *Dixon, supra.*

Defendant next charges that the trial court abandoned its mantel of impartiality and prejudiced the jury against defendant by making a comment that questioned defendant's credibility. We disagree. Defendant did not object at trial to the comment and, therefore, did not preserve the issue for appeal. See *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). This Court reviews unpreserved errors for plain error affecting defendant's rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995).

At the start of defendant's testimony the following exchange occurred:

Defendant:	I been waiting to tell the jury this story for twenty-seven months. I've been trying to get to court and trying to go to trial.
The Court:	Enough. Enough. That is not true and I'm not going to have it. Thank you.
Defense Counsel:	I will control my witness.

Defendant has not met his burden of showing that the court's brief comments unduly influenced the jury, deprived him of a fair trial, or were outcome-determinative.

Finally, defendant asserts, and the prosecution concedes, that the trial court erred when it ordered defendant to pay restitution to an assistant prosecuting attorney against whom defendant had filed a grievance. We agree. The compensatory nature of restitution is specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct. *People v Grant*, 455 Mich 221, 230; 565 NW2d 389 (1997). "Victim" is statutorily defined as an "individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1). Because she was not harmed as a result of defendant's crime, the assistant prosecuting attorney was clearly not a victim for purposes of restitution. Therefore, she is ineligible to recover litigation expenses from defendant and such order is vacated.

We note that we have considered defendant's late-filed Standard 4 brief which included additional claims of ineffective assistance of counsel, as well as prosecutorial misconduct, and conclude that none of the issues warrant relief. In brief, defendant waived the right to confront his

daughters in court when he failed to provide information as to their location and a *Miranda*[2] violation did not occur when defendant was asked where the children were located in attempt to secure their attendance at the trial. Defense counsel was not ineffective during the prosecutor's cross-examination of defendant because the question about defendant's attempts to remove judges from cases related to this matter was objected to by defense counsel and the objection was sustained, even though defendant interjected with "I don't mind answering that question;" the question about how many times defendant had been found in contempt of court was in response and rebuttal to defendant's testimony on direct exam that he had been waiting to tell the jury his story for twenty-seven months and had "been trying to get to court and trying to get to trial;" and the question about defendant having a driver's license while being blind was relevant to defendant's credibility. Further, defense counsel was not ineffective for failing to object during the prosecutor's closing argument which merely argued the evidence and all reasonable inferences arising from the evidence as related to the parties theories. See People v Bahoda, 448 Mich 261, 282-283; 531 NW2d 659 (1995). In sum, neither ineffective assistance of counsel nor prosecutorial misconduct denied defendant a fair trial. See *id*; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed, but the order of restitution is vacated.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh

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[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L : Ed 2d 694 (1966).

APPENDIX D

STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

February 25, 2005

Douglas C. Kendricks
2318 Valleyview Drive
Troy, MI 48098

RE: Douglas C. Kendricks as to Jon F. Hummel
File No. 2247/04

Dear Mr. Kendricks:

On January 27, 2005, Attorney Jon F. Hummel was issued the enclosed letter of admonishment. Pursuant to MCR 9.106(6), Attorney Hummel was given 21 days to file an objection to the admonishment. Attorney Hummel has not filed a notice of objection to the admonishment. Therefore, the admonishment served on Attorney Hummel will remain in effect.

If you have any questions or concerns regarding the disposition of this file, please do not hesitate to contact our office.

Very truly yours, "s/ Cynthia C. Bullington
Assistant Deputy Administrator

CCB/jb
Enclosure

APPENDIX D

STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

January 27, 2005

Jon F. Hummel
Attorney at Law
1201 Glenmeadow Lane
East Lansing, MI 48823

RE: Douglas C. Kendricks as to Jon F. Hummel
File No. 2247/04

Dear Mr. Hummel:

The complaint of Douglas C. Kendricks was filed on August 20, 2004, alleging improper conduct on your part.

The undersigned investigated this matter by carefully reviewing all statements and documentation submitted by the parties.

The complete file along with a recommendation was submitted to the Commissioners for their review and decision. At its regular monthly session in January of 2005, the Attorney Grievance Commission determined that you engaged in misconduct by your failure to represent Douglas Kendricks completely and effectively on appeal of his criminal conviction. You failed to file a motion for a Ginther hearing which, under the circumstances the case, should have been requested. Further, you failed to timely process the appeal resulting in the involuntary dismissal of the appeal. Your conduct violated MCR 9.104(A) (1)-(4); and the

Michigan Rules of Professional Conduct, to wit: 1.1 (a)-(c); and 1.3.

Based upon that finding and pursuant to MCR 9.106(6), you are admonished by all Commission without the filings of a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126, except as otherwise provided by MCR 9.115(J)(3). In accordance with MCR 9.106(6), you may, within twenty-one (21) days of this admonition, notify the Commission in writing that you object to the admonition. Upon timely receipt of such written objection, the Commission shall vacate the admonition and either dismiss the Request for Investigation or authorize the filing of a formal complaint against you with the Attorney Discipline Board.

Very truly yours, "s/ Cynthia C. Bullington
Assistant Deputy Administrator

CCB/jb

APPENDIX D

Rule 9.104 Grounds for Discipline in General; Adjudication Elsewhere

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;

A lawyer shall provide competent representation to a client. A lawyer shall not:

(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;

(b) handle a legal matter without preparation adequate in the circumstances; or

(c) neglect a legal matter entrusted to the lawyer.

Rule: 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the

lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.